UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/521
29 May 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 521

Case No. 570: SAEED

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Ahmed Osman, Vice-President, presiding; Mr. Arnold Kean; Mr. Luis de Posadas Montero;

Whereas, on 29 November 1990, Muhammad Anwar Saeed, a former staff member of the United Nations, specifically recruited for the United Nations Children's Fund (UNICEF), filed an application containing the following pleas:

"II. PLEAS

1. That the appellant respectfully submits that he does not accept and agree to the conclusions and recommendation contained in the report No. 790 case No. 89-39 (...) of the United Nations Joint Appeals Board (hereinafter referred to as the JAB) and further submits that action on these conclusions and recommendation be held in abeyance.

2. That the appellant firmly believes and asserts that sufficient expectations were created by UNICEF management for his long and continuous employment and that his separation from service on account of drafting correspondence and relations with the colleagues and the government counterparts, was unwarranted and illegal. The appellant therefore, requests that he may be reinstated to the job with UNICEF.

3. That the specific complaints by which the separation of the appellant was effected were drafting and his relations with his colleagues and the government officials. These specific complaints have not been proved before and even not accepted by the JAB on account of factual evidence produced. The appellant requests he may be exonerated.

4. That UNICEF management deliberately did not give a fair chance to the appellant to pass through the due process of the rules, regulations and procedures, thereby deprived of proper defense which amounts to miscarriage of justice, hence mala fides on the part of UNICEF management.

5. That the appellant was made the victim of the personal prejudices/grudge of Mr. Daniel James O'Dell, the then Senior Programme Planning Officer at UNICEF, Islamabad, therefore, the appellant prays that the judgement on the performance and relationship through the Performance Evaluation Report (PER) and the Notes for the Record (NFR) prepared by Mr. Julian Lambert [Chief, Health and Nutrition Unit] and concurred by Mr. O'Dell be ignored."

Whereas the Respondent filed his answer on 16 January 1991;

Whereas the Applicant filed written observations on 11 March 1991;

Whereas, on 29 April 1991, the Applicant requested, with reference to article 13 of the Rules of the Tribunal, that counsel be provided;

Whereas, on 14 May 1991, the Tribunal put questions to the Respondent concerning the Applicant's 29 April 1991 request;

Whereas, on 15 and 16 May 1991, the Respondent provided answers to the Tribunal's questions;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 15 January 1987, as National Officer, level B, in Pakistan. He was offered a two-year and 17-day fixed-term appointment expiring on 31 January 1989.

The Applicant's performance during the period 15 January 1987, to 31 December 1987, was evaluated in a Performance Evaluation Report, dated 7 April 1988. The Chief, Health and Nutrition Unit, who acted as the First Reporting Officer, stated that the Applicant's professional knowledge

"proved to be quite adequate" and that he had "developed a basic grasp of UNICEF rules and procedures". He noted that although the Applicant's "writing skills display a sound level of technical competence ... he must learn to adapt more to UNICEF style and express himself, both orally and in writing, more succinctly". He hoped that "the transition from being a practicing physician to ... a bureaucratic job" would be completed in the year to come. He also noted that the Applicant's "relationship with his government counterparts has been excellent".

On 29 June 1988, six female staff members of the UNICEF Office met with the Senior Policies/Programme Officer, and complained, inter alia, that on more than one occasion the Applicant had made derogatory comments about women in general, and about his female colleagues in particular, and that on at least one occasion he had sexually harassed a female staff member. The contents of the meeting were recorded in a Note for the File dated 20 July 1988, which was copied to the Senior Policies/Programme Officer. This Note was not made available to the Applicant at the time.

On 3, 4 and 20 July 1988, the Applicant had several meetings with the Chief, Health and Nutrition Unit, the Senior Policies Programme Officer, the Chief, Personnel and Administration and the UNICEF Representative in Pakistan. According to the Applicant's supervisors, the meeting on 3 July was held to discuss the Applicant's Performance Evaluation Report for the period 1 January - 30 June 1988, because his supervisor, the Chief, Health and Nutrition Unit, was being reassigned to New Delhi. His supervisor stated that it was pointed out to the Applicant that during the reporting period he had drafted letters to senior government officials in a tone incompatible with UNICEF standards, that his manner of dealing with senior government officials had led to complaints about the Applicant's attitude and behaviour, that a number of colleagues had complained about his attitude with relation to programmes in the provinces and that a number of female staff had complained to the Senior Policies Programme Officer concerning the Applicant's attitude toward women. According to the Chief, Health and Nutrition Unit, the Applicant had considered all points and stated he could not understand the reasons for the complaints. His supervisors thereupon advised him they would not recommend a renewal of his appointment.

According to the Applicant, the Chief, Health and Nutrition Unit, informed him that the Senior Programme Officer had started "hating" him after the Staff Association elections in which the Applicant had not supported the official candidate and because the Senior Programme Officer had wished to "elevate one of his closest friends" and female colleagues. Accordingly, it was the Senior Programme Officer's wish to reassign the Applicant or to terminate him.

The Applicant and his supervisors continued their discussions at subsequent meetings. The Applicant argued essentially that he was asked to resign because some government people and some female staff members did not like him. He made serious accusations against the Chief, Health and Nutrition Unit and the Senior Programme Officer.

In a memorandum dated 16 August 1988, the UNICEF Representative requested the Administrative Personnel Officer to make arrangements for a meeting with the Appointment and Promotion Committee for a review of the Applicant's contractual status as soon as possible after receipt of the Applicant's anticipated rebuttal to his Performance Evaluation Report. The UNICEF Representative noted in his memorandum that although the Applicant was qualified for his job, in order to perform as a Programme Officer he was expected to "maintain good relationships, internally as well as externally", which he seemed unable to do. He stated that neither the Applicant's supervisor nor the Senior Programme Officer thought that the Applicant should be offered a new appointment and set forth their reasons.

The Applicant's performance during the period 1 January 1988, to 30 June 1988, was evaluated in a report dated 29 August 1988. The Chief, Health and Nutrition Unit, who acted as First Reporting Officer, noted that although the Applicant had "demonstrated initiative in developing a number of contacts with government and other health workers ... he must learn to express himself more tactfully, particularly in the cases of senior government officers and senior UNICEF colleagues" whom he had "on more than one occasion offended". He also stated that the Applicant's drafting required improvement and that "considerable time" had been spent by the First Reporting Officer "in editing [the Applicant's] letters to [the] Government, as they are obviously too strong in language and could have a significant negative reception ... if sent". He also noted that personal

differences between the Applicant's colleagues had "seriously interfered with his performance" and "disturbed the equanimity of the office", resulting in complaints against the Applicant. He noted that all these problems had been discussed with the Applicant at length on a number of occasions. The Applicant asserted that during the reporting period job-related discussions never took place between them, nor had there been any discussions concerning the report.

On 27 September 1988, the Applicant filed a rebuttal of the above-mentioned Performance Evaluation Report. Mr. O'Dell, the Second Reporting Officer, commented on this rebuttal in a memorandum of 6 October 1988 and the First Reporting Officer also filed a memorandum. On 8 November 1988, the Applicant wrote a memorandum concerning both these sets of comments.

In a memorandum dated 6 November 1988, the Senior Programme Officer and the Applicant's new supervisor recommended "the non-continuation of [the Applicant's] FTC [fixed-term contract]" beyond 31 January 1989.

On 10 November 1988, the UNICEF Appointment and Promotion Committee (APC) in Pakistan considered the Applicant's case and recommended that his fixed-term contract not be extended beyond its expiration date, 31 January 1989. In a handwritten note dated 18 December 1988, the UNICEF Representative, to whom the APC reports, stated that he would consider the Applicant's case further.

On 29 December 1988, the Applicant wrote to the UNICEF Representative in Pakistan, complaining that he had not been given a chance to defend himself during what he considered to be disciplinary proceedings against charges fabricated against him by the Senior Programme Officer and the Chief, Health and Nutrition Unit. He stated that addressing these charges through discussion of his performance during the APC proceedings was a violation of his rights.

On 2 January 1989, the UNICEF Representative advised the Applicant that he had approved the recommendation of the APC "after careful consultation with both ... senior UNICEF colleagues and government counterparts".

The Applicant's performance during the period 1 July 1988, to 31 January 1989, was evaluated in a third performance evaluation report, dated 31 January 1989, in which the First Reporting Officer stated that the

Applicant's performance during the period had been "adversely affected" by the fact that his appointment would not be extended beyond the end of January 1989 and that he had received no new assignments.

On 16 February 1989, the Applicant requested the Secretary-General to review the decision not to extend his fixed-term appointment. On 23 May 1989, the Acting Executive Director, UNICEF, rejected the Applicant's request. On 21 July 1989, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 31 July 1990. Its conclusions and recommendation read as follows:

Conclusions and recommendation

63. The Panel concluded that:

(i) The appellant had no legal expectancy of renewal or extension of his fixed-term appointment nor could he, at the time of his separation, have had any reasonable expectations in that regard.

(ii) Although the change in attitude towards the appellant which Mr. O'Dell and Mr. Lambert displayed shortly after signing his first PER [Performance Evaluation Report] was not readily explained by what the record showed about the appellant's performance or conduct, there was no compelling evidence that this change was due to prejudice on the part of Mr. O'Dell.

(iii) The appellant had not sustained the burden of proof regarding his allegation that prejudice had led to the contested decision.

(iv) The procedure which had led to the contested decision had been attended by errors but none of these errors had been such as to vitiate the contested decision.

(v) Although the procedural errors referred to had not led to a miscarriage of justice, the appellant was entitled to some compensation for the failure fully to observe his procedural rights.

(vi) The Note for the Record on the meeting of six female staff members with Mr. O'Dell on 29 June 1988, should be removed from the appellant's file as the appellant had not been given the opportunity to rebut the allegations contained in it.

(vii) There was no reason to accede to the request of the appellant for a copy of the above Note with names and signatures for use in rehabilitation proceedings in a court of law as the Note was an internal document of UNICEF and could not have defamed the appellant outside the Organization.

64. In view of the above, the Panel recommends that the appellant be paid, as compensation for the failure to observe his procedural rights, an amount equal to two months' net base salary.

65. The Panel further recommends that the Note on the 29 June 1988 meeting of six female staff members with Mr. O'Dell be removed from the appellant's file.

66. The Panel makes no other recommendation in favour of the appeal."

On 2 August 1990, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and advised him that:

"The Secretary-General has re-examined your case in the light of the Board's report and noted the Board's conclusion that you had no legal expectancy of extension of your appointment nor sustained the burden of proof regarding your allegation of prejudice. The Board further concluded that the contested decision was not vitiated by procedural errors.

Notwithstanding the above, the Secretary-General has decided, in final and full settlement of your case:

(a) To pay you compensation in the amount of two months net base salary;

(b) To remove from your official status file the note of six staff members concerning the meeting of 29 June 1988;

(c) To take no further action on the matter."

On 29 November 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent created sufficient expectations of renewal based upon the Applicant's long and continuous service.

2. The specific complaints given as grounds for the Applicant's separation from service were disapproved by the JAB.

3. The Respondent deliberately deprived the Applicant of due process.

4. The Applicant was the victim of personal prejudice.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the the right nor the legal expectancy of continued employment with UNICEF beyond the expiry of his fixed-term appointment on 31 January 1989. Accordingly, his separation from service did not violate his rights.

2. The decision not to renew the Applicant's fixed-term appointment was not motivated by prejudice or other extraneous factors.

3. The Applicant was accorded due process and was granted sufficient compensation for any irregularities in procedure.

The Tribunal, having deliberated from 14 to 29 May 1991, now pronounces the following judgement:

I. The Applicant in his application complains that:

> "... during the proceedings of the JAB, he remained unrepresented and unheard and considers it an expartie [sic] process -- hence miscarriage of justice. This absence of representation has adversely affected the proceedings as far as the appellant's submission is concerned".

II. In paragraph 2 of Information Circular ST/IC/88/11 of 1 March 1988, it is stated that:

> "An important aspect of a smooth-functioning system of administrative justice is adequate access for staff members to necessary information, advice and, where required, representation before the Joint Appeals Board, the Joint Disciplinary Committee, the Administrative Tribunal or elsewhere."

III. If the Applicant did not have the benefit of counsel in the proceedings before the JAB, this was due to his own omission. He was advised by the Alternate Secretary of the JAB (in a letter of 18 August 1989) as to the procedure he should follow in order to obtain the services of counsel, but there is no record that he ever asked for counsel or took action in accordance with the advice received.

IV. In his application to the Tribunal, the Applicant requested a "list of panel of counsels". Although he had previously been informed in connection with the JAB proceeding as to how to arrange to secure counsel, there is no evidence that he himself attempted to do so. Instead, he submitted his written observations on 11 March 1991 and then on 22 April 1991, on the eve of the current session, he requested the appointment of a particular staff member (whom he also contacted directly) as his counsel. The Tribunal considers that article 13 of its Rules, to which the Applicant referred in his latest communication, does not require it to provide counsel, and that in any event there is no useful role counsel could play at the current stage, as the written proceedings are complete and no oral ones are contemplated.

V. The gravamen of the Applicant's case is that he had a legal expectancy of renewal of his fixed-term appointment upon its expiration, and that the decision not to renew his appointment was based on prejudice against him.

Rule 104.12(b) of the Staff Rules provides that: "The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment". Rule 109.7 provides that a fixed-term appointment expires "automatically and without prior notice on the expiration date specified in the letter of appointment". Furthermore, the Applicant's letter of appointment expressly stated that it "expires without prior notice on the 31st day of January 1989".

VI. The Applicant, however, contends that the positive nature of his first Performance Evaluation Report created a positive expectation of a career appointment with UNICEF, since the post held by the Applicant was on the permanent cadre. The jurisprudence of the Tribunal has established that an expectancy of renewal is not created by efficient performance alone (Judgement No. 205, El-Naggar (1975), para. IV) but that the expectancy of continued employment may nevertheless exist in view of the totality of the circumstances surrounding a staff member's separation from service (Judgement No. 142, Bhattacharyya (1971)). In the present case the Applicant contends that "in the circumstances prevailing in the Pakistan labour market, the phrase in the letter of appointment denying any expectancy of continued employment should be considered as meaning the opposite". The Applicant does not elaborate on this argument, which was not accepted by the JAB and the Tribunal rejects it as without foundation.

VII. The Applicant contends that the decision not to extend his appointment was motivated by prejudice on the part of his immediate supervisor (Mr. Lambert) and the Senior Programme Planning Officer (Mr. O'Dell) who developed a grudge against the Applicant. Having examined the documentation, the JAB admitted, and the Tribunal concurs, that the Board had "no possibility of inquiring further into the truth by hearing witnesses or otherwise".

VIII. In the Tribunal's view, the most persuasive evidence of prejudice arises from the juxtaposition of two conflicting Performance Evaluation Reports, respectively covering the periods 15 January-31 December 1987, and 1 January-30 June 1988. The relevant part of the Applicant's Performance Evaluation Report for the period 15 January-31 December 1987, signed by Mr. Lambert on 13 March 1988, is summarized as follows by the JAB:

> "4. ... In part 4 of this report, the appellant's immediate supervisor, J. Lambert, Chief, Health and Nutrition Unit, stated that the appellant's professional knowledge had proved to be quite adequate and that he had developed a basic grasp of UNICEF rules and procedures. The appellant's writing skills displayed a sound level of technical competence but he had to learn to adapt to

> UNICEF style and to express himself, both orally and in writing, more succinctly. He was quick to grasp a new subject but had to improve on following through on assignments. Mr. Lambert hoped that the difficult transition from practicing physician to a bureaucratic job in UNICEF would be completed in the following year. The appellant had established a good working relationship with his colleagues in the Health and Nutrition Unit. His relationship with his government counterparts had been excellent. During the middle of the year, the appellant had, due to personal reasons, had certain problems in giving his full attention to his work. Mr. Lambert was confident that such problems would not interfere with his work or affect his relationship with his colleagues in the future. In part 5.3 of the PER [Performance Evaluation Report], the second reporting officer, Mr. D.J. O'Dell, Senior Policies/Programme Officer (...), commented that he was well acquainted with the appellant's work and that he agreed with the comments of the first reporting officer. He was certain that the appellant's performance in 1988 would improve, demonstrating his potential as a capable Programme Officer in UNICEF."

IX. Within four months after March 1988, when the first Performance Evaluation Report was prepared, events occurred which were inconsistent with this generally favourable report. According to the Applicant, by the end of June 1988, extraneous circumstances were influencing his superior officers' opinion of him.

X. Mr. Lambert, he states, called him on 3 July 1988, to inform him that Mr. O'Dell had taken a dislike to him and had decided that he must resign or face termination. On the same day, at 1 p.m., Mr. Lambert had a meeting with the Applicant at which, again according to the Applicant, he started with laudatory comments on his competence and performance but indicated that Mr. O'Dell wanted to elevate Ms. R. Gill to take charge of the Health and Nutrition Unit upon Mr. Lambert's impending assignment to New Delhi and that Mr. O'Dell had started "hating" the Applicant following the Staff Association elections because he had not voted for the "official" candidate. Mr. Lambert, however, contends that this was a Performance Evaluation Report meeting and that the statements attributed to him were in fact not made. At 3.30 p.m. on the same day a meeting was held between Mr. Lambert, Mr. O'Dell and the Applicant, at which Mr. O'Dell is alleged by the Applicant to have said that

there was no place in UNICEF for the Applicant and for Mr. O'Dell himself, and that if the Applicant did not resign, Mr. O'Dell would terminate him by leveling charges against him. The record of the meeting, prepared by Mr. Lambert and Mr. O'Dell, indicated that Mr. Lambert had pointed out that, during the reporting period 1 January-30 June 1988, a number of serious problems had arisen, including the following:

1. The Applicant had drafted letters to senior government officers in a tone incompatible with UNICEF standards;

2. His manner of dealing with senior government officials had led to complaints about his attitude and behaviour;

3. A number of colleagues had complained about his attitude towards them relating to programmes in the provinces;

4. A number of female staff had commented adversely to Mr. Lambert about the Applicant's attitude toward women.

The Applicant, however, denies the accuracy of the record of these meetings and asserts that Mr. O'Dell had queried how the Applicant could ignore his orders concerning voting. Mr. Lambert reiterated these problems when, on 25 August 1988, he signed part 5.2 of the Applicant's Performance Evaluation Report for the period January-June 1988.

XI. The Tribunal concludes that whatever may be a true account of these events in June and July 1988, relations between the Applicant and his two superiors had deteriorated with remarkable speed since his Performance Evaluation Report for the period 15 January-31 December 1987. In particular it is not disputed that the Applicant was asked to resign.

XII. The Tribunal has also considered the circumstances surrounding a meeting of 29 June 1988, in which six female staff members complained of h assment by the Applicant. The Note for the File recording the contents of this meeting, dated 20 July 1988, was not shown to the Applicant and he was not given the opportunity to rebut it. It was in fact put in his personnel file without his knowledge, and was available to those responsible for considering whether or not his contract should be renewed. This was, in the Tribunal's view, a serious lack of due process hardly attributable to ignorance or negligence on the part of the Applicant's superiors. It provides

evidence, if not conclusive evidence, that they were attempting to present him in an unfavourable light. This serious lack of due process is, in the Tribunal's view, sufficient to tip the scales of probability toward proof of prejudice on the part of Mr. Lambert and Mr. O'Dell. The Tribunal considers that the Respondent's acceptance of the JAB's recommendation that this note be removed from the files should now be implemented.

XIII. In sum, therefore, the Tribunal accepts the JAB's analysis of the evidence, but it does not share its conclusion that the Applicant has failed to discharge the burden of proof of prejudice. The Tribunal observes that the burden of proof in such a matter is not the heavy one of proof beyond reasonable doubt which rests upon the prosecution in a criminal proceeding.

XIV. There were other procedural irregularities. According to the Applicant there were no on-going discussions between the Applicant and his superiors for the purpose of improving his performance, nor was Mr. O'Dell's recommendation of non-renewal (made on 6 November 1988 and reviewed by the Appointment and Promotion Committee (APC) on 10 November 1988) copied to the Applicant. The Tribunal shares the view of the JAB that these documents should not have been sent to the APC without having been seen by the Applicant.

XV. The Tribunal, having found that there was no legal expectancy of renewal, will not order the Applicant's re-employment. However, in view of the gravity of the procedural irregularities and of the evidence of prejudice, the Tribunal considers that the Applicant should receive substantial compensation for the maladministration which necessarily influenced his separation from the service (Judgement No. 486, Picci (1990)). The Tribunal, therefore, orders the Respondent to pay to the Applicant the amount of six months' net base salary, at the rate in effect at the time of his separation from service, less the two months' net base salary previously paid to him.

XVI. Except as indicated above, all other pleas are rejected.

(Signatures)

Ahmed OSMAN
Vice-President, presiding

Arnold KEAN
Member

Luis de POSADAS MONTERO
Member

Geneva, 29 May 1991

Paul C. SZASZ
Acting Executive Secretary